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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:)	Supreme Court No. R-11-0033
)	
PETITION TO AMEND ER 3.8 OF)	COMMENT OF
THE ARIZONA RULES OF)	PROFESSORS IN SUPPORT
PROFESSIONAL CONDUCT (RULE)	OF PETITION TO AMEND
42 OF THE ARIZONA RULES OF)	ER 3.8 OF THE ARIZONA
SUPREME COURT))	RULES OF PROFESSIONAL
)	CONDUCT
)	

Pursuant to Rule 28 of the Arizona Rules of Supreme Court, Professors Green and Yaroshefsky hereby file this comment in response to the Petition to Amend Ethical Rule (ER) 3.8 of the Arizona Rules of Professional Conduct, which is based on Rule 3.8(g) and (h) of the Model Rules of Professional

1 Conduct. For the reasons that follow, we support the Court’s proposed rule and
2 suggest the following modifications.

3 I. ABOUT THE AUTHORS

4 Bruce A. Green is the Louis Stein Professor and Director of the Louis
5 Stein Center for Law and Ethics at Fordham University School of Law. He was
6 a federal prosecutor before joining the full-time Fordham faculty in 1987. Ellen
7 Yaroshefsky is a Clinical Professor of Law and Director of the Jacob Burns
8 Ethics Center in the Practice of Law at Cardozo School of Law. She was a
9 criminal defense attorney before joining the full-time Cardozo faculty in 1993.
10 Both of us have worked extensively on issues of criminal justice and legal
11 ethics on the local, state and national levels, and we each teach a seminar on
12 Ethics in Criminal Advocacy at our respective law schools. A principal subject
13 of our scholarship is prosecutors’ ethics.¹

14 As members of the NY State Bar Association Committee on Standards of
15 Attorney Conduct and co-chairs of the ABA Criminal Justice Section’s ethics
16 committee, we together played a significant role over the course of several
17 years in the ABA’s adoption of Rule 3.8(g) and (h) of the Model Rules of
18 Professional Conduct and in New York’s adoption of similar provisions.

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22 ¹ See, e.g., Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial*
23 *Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L.
24 467 (2009); Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO.
25 J. LEGAL ETHICS 873 (2012); Bruce A. Green, *Prosecutors’ Ethical Duty of*
26 *Disclosure*, 48 SAN DIEGO L. REV. 57 (2011); Ellen Yaroshefsky & Bruce A.
27 Green, *Prosecutors’ Ethics in Context: Influences on Prosecutorial Disclosure*,
in LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT 269-92
(Leslie C. Levin & Lynn Mather, eds., Univ. of Chicago Press 2012).

1 II. WE SUPPORT THE COURT’S EFFORTS TO ADOPT THE MODEL RULE.

2 Our comments track the five questions in this Court’s order of August 30,
3 2012:

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5 **(1) What criteria should trigger the prosecutor’s ethical duty to**
6 **disclose exculpatory information after a conviction? Should it be**
7 **“new, credible and material information,” “credible and material**
8 **information,” or some alternative phrasing of the criteria?**

9 We support both the ABA’s language and this Court’s proposed
10 language, which we believe to be substantively the same.² We believe a
11 disclosure obligation should be triggered when credible evidence “creates a
12 reasonable likelihood that a convicted defendant did not commit an offense of
13 which the defendant was convicted,” at which point the prosecutor should
14 disclose at least any new evidence that is material to establishing the
15 defendant’s innocence.

16 **(2) Should this Court retain or delete the prosecutor’s duty, upon**
17 **receipt of exculpatory information after a conviction, to “undertake**
18 **further investigation, or make reasonable efforts to cause an**
19 **investigation, to determine whether the defendant was convicted of**
20 **an offense that the defendant did not commit”?**

21 The responsibility of a prosecutor’s office that secured a potentially
22 erroneous conviction should not end with disclosure. As the Comment to ABA
23 Model Rule 3.8 recognizes, a prosecutor’s responsibility as “a minister of
24 justice . . . carries with it specific obligations to see . . . that special precautions

25 ² We note that we are unaware of any enforcement or other issues in
26 the eight states that have already adopted the ABA’s amendment in whole or
27 part, and all eight states use a disclosure standard generally similar to the
28 ABA’s amendment.

are taken to prevent and to rectify the conviction of innocent persons.” If a prosecutor learns of “new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted,” the prosecutor whose office obtained the conviction should have a duty to investigate the matter further or to make reasonable efforts to cause a law enforcement agency to do so. MODEL RULES OF PROF’L CONDUCT R. 3.8(g). In discussions of the proposed rule, prosecutors have acknowledged that when faced with strong evidence that an innocent person may have been convicted, they would indeed review the matter to determine whether the person is, in fact, innocent. Therefore, placing this obligation in the ethical rules should not unduly burden prosecutors (who, by their own account, would already act accordingly).

Because the word “investigate” has caused unnecessary controversy, however, we would support in the alternative the language in the Washington Rules of Professional Conduct: When the prosecutor learns of evidence creating a reasonable likelihood that a person has been wrongfully convicted, the prosecutor shall “make reasonable efforts to inquire into the matter, or make reasonable efforts to cause the appropriate law enforcement agency to undertake an investigation into the matter.” WASH. R. PROF’L CONDUCT R. 3.8(g)(2)(B).

(3) Should the prosecutor’s duty be different depending on whether the conviction was obtained in the prosecutor’s jurisdiction or outside that jurisdiction?

We support the distinction recognized in both the ABA’s amendment and the Court’s proposed rule. The ultimate responsibilities to investigate and rectify convictions of innocent individuals should be carried by the prosecutor in the office that secured the conviction.

1 Model Rule encourages harmony, consistency, and clarity across jurisdictions.
2 We thank the Court for this opportunity to comment and for its efforts in
3 reviewing and amending ER 3.8 in light of the Model Rule amendment.

4 **RESPECTFULLY SUBMITTED** this 20th day of May, 2013.

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6 By /s/Bruce Green
Bruce Green

7
8 /s/Ellen Yaroshefsky
Ellen Yaroshefsky

1 Electronic copy filed with the Clerk
2 of the Supreme Court of Arizona
3 this 20th day of May, 2013.

4 Copies of this Comment mailed
5 this 20th day of May, 2013, to:

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